In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1531

HARVEY LEE DAVIS, PETITIONER

v.

SELECTIVE SERVICE BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner was classified I–A by his local draft board, and, in February 1969, was ordered to report for induction (Pet. App. A–2). As he was then engaged in Peace Corps activities in Peru, the date of his induction was postponed at his request for seven months; in September 1969, he was ordered to report for induction on October 15, 1969 (Pet. App. A–2). On October 7, 1969, petitioner requested that his local board reopen and consider anew his I–A classification, claiming that, following his receipt of his orders to report for induction in February 1969, his beliefs had crystallized so that he now qualified for conscientious objector (I–O) status (Pet. 4).

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Petitioner's induction date was once again postponed so that the local board could consider his request. On October 22, 1969, following a personal interview, the local board concluded "that Mr. Davis did not present sufficient proof of religious conviction and belief to justify granting a I–O classification and it was therefore the decision of the Board that insufficient new information was presented by Mr. Davis to justify the reopening of his classification" (App. 32).[1] Petitioner was again ordered to report for induction.

He then brought this civil suit in the United States District Court for the Northern District of Texas, seeking to enjoin his induction. The district court, after issuing a temporary stay against induction, entered summary judgment for the government on the ground that a post-induction-notice claim of conscientious objector status did not entitle a registrant to reopening of his classification (Pet. App. B–1). On expiration of the temporary stay (which both the court of appeals and this Court declined to extend), petitioner was ordered to report for induction on February 25, 1970; he failed to report. However, the present case involves only the civil suit for an injunction. No indictment has been returned.

Petitioner appealed the district court's judgment to the court of appeals, which affirmed on the ground that under Section 10(b)(3) of the Military Selective Service Act of 1967, 50 U.S.C. App. 460(b)(3), it

[1] "App." references are to the printed Appendix filed in the court below, which is on file in this Court.

was "without power to enjoin Davis' draft board from ordering his induction" (Pet. App. A–1, A–5). The court below observed (Pet. App. A–6) that "there is an absence of draft board conduct which would rise to the level of being 'blatantly lawless'" within the limited exception to Section 10(b)(3) enunciated by this Court in *Oestereich* v. *Selective Service Board,* 393 U.S. 233.

1. Petitioner's principal contention is that the local board's refusal to reopen his I–A classification on the basis of a post-notice conscientious objector claim was contrary to the requirements of Selective Service regulation 32 C.F.R. 1625.2, and thus amounted to the type of lawless behavior that this Court held was subject to pre-induction judicial review in *Oestereich* v. *Selective Service Board,* 393 U.S. 233, and *Breen* v. *Selective Service Board,* 396 U.S. 460. Petitioner's major premise has, however, now been rejected by this Court's recent decision in *Ehlert* v. *United States,* No. 120, this Term, April 21, 1971.

2. It appears, in any event, that petitioner's local board did in fact consider his claim and found that his professed views failed to qualify for exemption under the statute. See 50 U.S.C. App. 456(j). Review of such a determination under the applicable "basis in fact" standard is a matter which the statute has reserved to the courts only "after the registrant has responded either affirmatively or negatively to an order to report for induction * * *." 50 U.S.C. App. (Supp. V) 460(b)(3); *Clark* v. *Gabriel,* 393 U.S. 256. Thus, since petitioner failed to report for induction

as ordered after he instituted the present proceedings, judicial consideration of his challenge to the validity of his classification was properly deferred to the criminal prosecution for that alleged offense.[2]

3. Since the petitioner has failed to report for induction, the civil suit would now seem to be moot.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

APRIL 1971.

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[2] Petitioner asserts (Pet. 10–13) that a board's action in refusing to reopen after notice should be differentiated from the action it takes in denying him the status sought in the post-notice claim. This, however, ignores the plain language of 32 C.F.R. 1625.2, which precludes a local board from reopening unless it "first specifically finds that there has been a change in the registrant's status * * *," *i.e.*, that he is entitled to the exemption or deferment he seeks. Thus, a post-notice claim is, by the terms of the regulation itself, to be treated differently by local boards than the pre-notice claim discussed by this Court in *Mulloy* v. *United States*, 398 U.S. 410. See *Paszel* v. *Laird*, 426 F. 2d 1169 (C.A. 2). Of course, the question whether the *Mulloy* rationale could somehow be extended to the post-notice situation within the meaning of the regulation is now academic as to conscientious objector claims in view of *Ehlert*. At all events, it is clearly not a proper issue to be resolved in an action seeking pre-induction judicial review.

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